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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES RAE WELLER, Defendant and Appellant.	E034611 (Super.Ct.No. SWF001148) OPINION

APPEAL from the Superior Court of Riverside County. J. Thompson Hanks, Judge. Affirmed in part, reversed in part. Remanded for resentencing.

Jeffrey J. Stuetz, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Meagan J. Beale, Supervising Deputy Attorney General, and Tami Falkenstein Hennick, Deputy Attorney General, for Plaintiff and Respondent.

SEE DISSENTING OPINION ATTACHED

Following a jury trial, defendant Charles Rae Weller was convicted of one count of kidnapping for the purpose of sexually molesting a child, one count of lewd act upon a child under 14 years of age, and one count of child abduction. (Pen. Code, §§ 207, subd. (b), 278 & 288, subd. (a).[1]) Defendant was sentenced to an eight-year determinate term, concurrent six-year and three-year terms, and a consecutive term of 25 years to life. He appeals contending the prosecution failed to prove the corpus delicti of his crimes. He also challenges his sentence.

FACTS

In the summer 2002, defendant, a 74-year-old registered sex offender, was living in the rural Anza community. He was a child molester. Defendant delivered groceries to the home of B. R. and K. M., a couple who lived together with B. R.'s 2-l/2-year-old son, Daniel. Both B. R. and K. M. knew defendant had molested preteen boys in the past. K. M. had known defendant for a long time, and he had told B. R. that Daniel should not be around, nor left alone with, defendant. B. R. and K. M. agreed Daniel was never to be left alone with defendant.

According to B. R., whenever defendant delivered groceries he was not allowed inside the house. However, B. R.'s and K. M.'s next door neighbor, Cathy P., testified that she had seen defendant inside the B. R.-K. M. residence. Cathy P., who also knew that defendant was a child molester, had two preteen 10-year-old sons. She expressed her

[1] All further statutory references are to the Penal Code unless otherwise indicated.

concerns about defendant to both B. R. and K. M. K. M. became very defensive and told Cathy P. she did not know what she was talking about.

On August 15, 2002, B. R. left Daniel in the care of K. M., who was painting the outside of the house with the help of a friend, Memo.[2] From inside her home, Cathy P. saw defendant drive up to the B. R.-K. M. residence. After defendant got out of his car, Daniel came running up to him. Defendant picked up Daniel and gave him a big hug. The two walked off and out of Cathy P.'s view for a few minutes. When Cathy P. next saw them, Daniel was in the back seat of defendant's vehicle and defendant was closing the back door. Cathy P. then saw defendant enter the car and drive off. Shortly thereafter, less than 20 minutes, defendant and Daniel returned. When defendant took Daniel out of the car, he had suckers and candy in his hands.

Although Cathy P. had previously called the Riverside County Sheriff's Hemet station about defendant, she did not immediately call the police because she "didn't think that much of it, because of Daniel being just a baby." Nor did she walk over and tell K. M. what she had seen, even though she had known he was at home outside painting the house. The next day, or possibly the day after, Cathy P. told B. R. what she had seen.

On September 8, 2002, Cathy P. called the Hemet Sheriff's station and spoke to Senior Investigator Kevin Duffy about seeing defendant at the B. R.-K. M. residence talking to her 10-year-old son Justin and one of his friends. Four days later, in response to this call, Investigator Duffy interviewed Cathy P.'s next door neighbor, Teresa P.

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[2] Memo was raised by defendant.

Teresa P., who had four children, reported that she saw defendant on September 11 driving up and down her street four times while looking in her yard. Teresa P.'s two boys, ages 13 and 11, would play in the yard with Cathy P.'s two 10-year-old boys. Teresa P. reported seeing defendant park his car near the park where the school bus stopped to let off the children.

On September 17, 2002, Investigator Duffy conducted a full interview with Cathy P. Cathy P. reported that she had seen defendant driving slowly in the neighborhood up and down her street several times while looking at her children when they played outside in the yard. During one four- to five-day period, Cathy P. saw defendant drive past her home 25 times. Cathy P. mentioned "in passing" what she had seen on August 15 regarding Daniel.

There was no physical evidence indicating that Daniel had been molested. However, since August 15, B. R. had noticed changes in Daniel's behavior. Daniel, who was in the process of being "potty trained," had started going to the bathroom outside, something which he had never done before. He also began hitting a lot and on one occasion he showed his "private parts" to the little boy next door.

On October 3, 2002, after previous interviews with defendant, Investigator Duffy interviewed defendant at the Hemet station. Defendant's videotaped statement was played for the jury. During this interview, defendant admitted he had taken Daniel to the park just down the street without receiving either B. R.'s or K. M.'s permission. At some point during the drive, defendant touched Daniel's penis through his clothing although he

claimed that it was done inadvertently and innocently. Defendant understood that what he had done was wrong.

The prosecution also introduced the testimony of Terry T. Terry T. knew defendant in 1972 or 1973 when Terry T. was 11 or 12 years old. Terry T. met defendant at a park and they became friends. Defendant went to Terry T.'s home two or three times a week and became friends with Terry T.'s family. On one occasion Terry T. rode his bike to defendant's apartment. It was the first time he had been there. Terry T. went inside where he and defendant talked for a few minutes before defendant "threw him down" on a bed, pulled his shorts down and sodomized him. Terry T. was screaming and crying as defendant held him down. After sodomizing Terry T., defendant offered him money to not report what had happened.

Defendant did not testify; however, he did introduce character evidence from Robert Reece, the pastor of the Anza Baptist Church where defendant had been an active member of the congregation for 10 years. Pastor Reece, who has a high regard for defendant's integrity, testified that after the enactment of the Megan's Law, a public community meeting was held and defendant was identified as a child molester and sexual predator by the Riverside County Sheriff's Department. The defense also introduced evidence that in participating in church and community programs, defendant never participated in any activities or programs involving children.

SUFFICIENCY OF EVIDENCE

Defendant claims that, apart from his admissions during the police interview, the prosecution failed to prove the corpus delicti of the crimes of kidnapping for the purpose

of sexually molesting a child (§ 207, subd. (b)), lewd act upon a child under 14 years of age (§ 288, subd. (a)), and child abduction (§ 278). We disagree.

"'In every criminal trial, the prosecution must prove the corpus delicti, or the body of the crime itself—i.e., the fact of injury, loss, or harm, and the existence of a criminal agency as its cause. In California, it has traditionally been held, the prosecution cannot satisfy this burden by relying *exclusively* upon the extrajudicial statements, confessions, or admissions of the defendant. [Citations.] . . .'" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1126-1127.) In *People v. Alvarez* (2002) 27 Cal.4th 1161, 1165, our state's highest court held that "article I, section 28, subdivision (d) of the California Constitution, the 'Truth in Evidence' provision adopted by Proposition 8 in 1982, abrogated any corpus delicti basis for excluding a defendant's extrajudicial statements from evidence. . . . Accordingly, we need not decide whether defendant adequately preserved a corpus delicti objection[.]" (*People v. Gutierrez*, *supra*, 28 Cal.4th 1083, 1127.)

"The elements of the corpus delicti are (1) the injury, loss or harm, and (2) the criminal agency that has caused the injury, loss or harm. [Citation.] 'The independent proof may be by circumstantial evidence [citation], and it need not be beyond a reasonable doubt. A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient. [Citations.]' [Citation.]" (*People v. Wright* (1990) 52 Cal.3d 367, 404; see also *People v. Jennings* (1991) 53 Cal.3d 334, 368 ["We reemphasize that the quantum of evidence the People must produce in order to satisfy the corpus delicti rule is quite modest; case law describes it as a 'slight or prima facie'

showing. [Citations.]"].) "[T]he corpus delicti rule is satisfied by the introduction of evidence which creates a reasonable inference that [an injury] could have been caused by a criminal agency . . . even in the presence of an equally plausible noncriminal explanation of the event. [Citations.]" (*People v. Diaz* (1992) 3 Cal.4th 495, 529, internal quotation marks omitted.) The application of this rule does not weaken the prosecutor's burden of establishing every element of the offense beyond a reasonable doubt. "The corpus delicti rule is a rule of law that governs the admissibility of evidence. [Citations.] It has no bearing on the prosecution's burden to prove beyond a reasonable doubt all elements of the offense . . . ." (*Ibid*.)

With this understanding of the corpus delicti rule in mind, we analyze the evidence supporting each of the charged offenses.

A. Section 207, subdivision (b).

A conviction for section 207, subdivision (b) requires that a "person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go . . . into another part of the same county . . . ."

Here, Cathy P. testified that she witnessed defendant drive away with Daniel in the car. Daniel's mother testified that she and K. M. had agreed that they would never allow Daniel to be alone with defendant. Daniel's mother also stated that she never gave defendant permission to take Daniel anywhere. When defendant returned with Daniel, he had suckers and candy in his hands. Afterwards, Daniel's behavior markedly changed. Daniel began hitting a lot, urinating outside, and he showed his "private parts" to the little

boy next door. Regarding defendant's sexual desires, several witnesses testified that they were aware of defendant's sexual preference for "boys." Two witnesses stated that defendant would drive slowly up and down the street looking at the children. Also, defendant was seen parked at the school bus stop where the neighborhood children were dropped off.

Defendant's pastor testified that he was aware of defendant's past and that guidelines were established so that defendant could be active in the church, i.e., defendant was not permitted to be a part of any activity involving youth. The pastor further stated that defendant "placed himself for ten years in a level of accountability with me personally and with about four other men regarding these matters." Finally, there was testimony from one of defendant's victims from 30 years ago. When the victim was 11 or 12 years old, defendant befriended him and subsequently sodomized him.

Taken as a whole, the evidence provided a "slight or prima facie" showing permitting the reasonable inference that a violation of section 207, subdivision (b) was committed by defendant.

B. Section 288, subdivision (a).

Section 288, subdivision (a) states that any person who "willfully and lewdly commits any lewd or lascivious act" on the body of a child under the age of 14, "with the intent of arousing . . . the lust, passions, or sexual desires of that person or the child," is guilty of a felony offense. Any touching of a child under the age of 14 violates this section, even if the touching is outwardly innocuous and inoffensive, if it is accompanied

by the intent to arouse or gratify the sexual desires of either the perpetrator or the victim. (*People v. Martinez* (1995) 11 Cal.4th 434, 450-452.)

The above evidence, more particularly Daniel's change in behavior following his "ride" with defendant, provides the "slight or prima facie" showing which permits the reasonable inference that a violation of section 288, subdivision (a) was committed. Nonetheless, defendant appears to question whether a lewd or lascivious act was committed upon Daniel. However, as stated above, the corpus delicti evidence need not establish all the elements of the crime beyond a reasonable doubt. The corpus delicti rule sets forth only a threshold requirement to show that a crime in fact occurred. "A slight or prima facie showing, permitting the reasonable inference that a crime was committed, is sufficient and once this threshold is met, the defendant's admissions may be considered on all issues." (*People v. McGlothen* (1987) 190 Cal.App.3d 1005, 1014; see also *People v. Daly* (1992) 8 Cal.App.4th 47, 59.) Here, the fact that defendant took Daniel on a ride without his parent's consent, coupled with Daniel's change in behavior following the "outing" permits the reasonable inference that a crime was committed.

In *People v. Culton* (1992) 11 Cal.App.4th 363, this court faced a similar factual situation involving the corpus delicti rule. Culton was convicted of 10 counts of lewd and lascivious acts on a child under the age of 14 years, more specifically, less than five years old. On appeal, he claimed that there was insufficient evidence of the corpus delicti as to each of the 10 offenses of which he was convicted. (*Id*. at p. 365.) Rejecting his contention, we affirmed. In support of our decision we considered the evidence presented by both sides through the testimony of Dr. Trenkle and Ms. Ruggreiri. On

behalf of the prosecution, Dr. Trenkle testified that he conducted a forensic genital exam of the child and noticed abnormalities or physical symptoms which, in his opinion, were consistent with the possibility that the child may have been the victim of sexual assault or abuse. (*Id.* at p. 368.) On behalf of the defense, Ms. Ruggreiri testified that she is the child's aunt and that the child had developed chicken pox in her vaginal area and had scratched that area heavily. (*Id*. at p. 370.)

Faced with the above conflicting testimony, the trial court found that there was sufficient evidence of the corpus delicti to admit defendant's extrajudicial statements. (*People v. Culton*, *supra*, 11 Cal.App.4th 363, 371.) We agreed, finding Dr. Trenkle's testimony that the child's adhesions could have been caused by the rubbing of her genital area by a finger or hand of someone other than herself. While we noted that a case of chicken pox could provide a "plausible explanation for the cause of the adhesions, it does not preclude another plausible explanation–that the adhesions were partially, if not wholly, caused by a third party's rubbing her vaginal area." (*Id*. at pp. 371-372.) We concluded that Dr. Trenkle's testimony, in its entirety, provided sufficient evidence to raise reasonable inferences of the corpus delicti of the offenses charged against the defendant.

The same is true here. While Daniel's change in behavior following his "ride" with defendant could be explained as being typical toddler behavior, it does not preclude another plausible explanation, i.e., that his behavioral change was the result of an inappropriate touching by defendant.

C. Section 278.

Section 278 provides that "[e]very person, not having a right to custody, who maliciously takes, entices away, keeps, withholds, or conceals any child with the intent to detain or conceal that child from a lawful custodian shall be punished by imprisonment in a county jail not exceeding one year. . . ."

Here, Daniel's mother testified that she and K. M. had agreed that they would never allow Daniel to be alone with defendant. In fact, it was K. M. who "told [B. R.] not even to let the baby go around [defendant] alone ever." Daniel was not K. M.'s son, he was B. R.'s child, and B. R. never gave defendant permission to take Daniel anywhere. According to defendant's pastor, defendant was aware that he was not to be a part of any activities or work with any youth or any children. At the time defendant drove off with Daniel, there were no other adults present. Given this evidence it is reasonable to infer that defendant violated section 278.

Based on the above, we conclude that the prosecution presented ample evidence, apart from defendant's admission, to establish that the crimes occurred.

SENTENCING

A. Section 667.71.

1. Reference to section 667.61.

Count 3 of the information charged defendant with violating section 278. In a second paragraph, the prosecution further alleged that defendant is a habitual sexual

offender within the meaning of section 667.71[3] because on or about May 28, 1974, he was convicted of violating section 288, subdivision (a). The trial court found this allegation to be true. However, when it imposed sentence, the court referred to section 667.61[4] instead of 667.71, and sentenced defendant to a consecutive 25-year-to-life term in addition to three determinate terms for counts 1, 2 and 3, with counts 2 and 3 terms running concurrent to the term for count 1. Under these circumstances, defendant contends the imposition of a consecutive 25-year-to-life punishment constitutes an unauthorized punishment and must be vacated. We disagree.

The pleadings are clear. Defendant was charged with being a habitual sexual offender under section 667.71. The bench trial on the section 667.71 allegation was conducted on the same day that defendant was sentenced. The court referred to section 667.71 two times during the bench trial and three times during sentencing. In finding this allegation to be true, the trial court stated: "It does appear that the defendant does fall within the provisions of 667.71, and I do so find." At sentencing, both sides agreed that the trial court was sentencing defendant pursuant to section 667.71:

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[3] Under section 667.71, subdivision (a), which defines a habitual sexual offender as a person who has been previously convicted of one or more of certain specified offenses and who is convicted in the present proceeding of one of those offenses, the court may impose a separate prison term for each of a defendant's new convictions, and is not limited to only a single term of 25 years to life.

[4] Section 667.61, known as the "One Strike" law, requires imposition of a sentence of 25 years to life in prison if a person is convicted of one of the sexual offenses listed in subdivision (c) of the statute and certain other triggering circumstances are found to exist. (§ 667.61, subds. (a), (c), (d) & (e).)

"[THE COURT:] It appears to me that the defendant is statutorily ineligible for a grant of probation under any circumstances, since the 667.71 allegation has been found to be true. And there -- the only real issue that remains is the -- the 667.71 carries a term of 25 to life. And it appears to me that the only remaining issues are the sentencing on the counts, the 207, 288, and the 278.

"[DEFENSE COUNSEL]: Yes. Your Honor, I would like to make one brief comment with respect to the 667.71 habitual sexual offender."

While the court may have misspoke with regard to the actual sentence under section 667.71, i.e., "And then I am going to sentence him on the 667.61, 25 to life[,]" defendant was properly sentenced in accordance with section 667.71.

2. Allegation of Section 667.71 in the information.

In the information filed against defendant, it was alleged in count 3 that defendant violated section 278, child abduction. Immediately following this allegation was the section 667.71 allegation which provided: "The District Attorney of the County of Riverside further charges that in the commission and attempted commission of the *above offense*, the defendant . . . is a Habitual Sexual Offender . . . ." In finding the allegation to be true, the trial court stated: "It does appear that the defendant does fall within the provisions of 667.71, and I do so find."

On appeal, defendant contends that it is not sufficient for the court to find that he falls within the provisions of the statute; rather, it must find the 667.71 allegation to be true or not true. He claims that because the section 667.71 allegation was limited to

count 3, a crime which does not qualify as a habitual offender offense, there was insufficient evidence to support the trial court's finding. We disagree.

The language in the statute is clear. Section 667.71, subdivision (d) "shall apply only if the defendant's status as a habitual sexual offender is alleged in the information . . . ." There is no requirement that the allegation must accompany the specific crime which qualifies under section 667.71. The fact that section 667.71 was alleged alerted defendant to its application. The trial court was presented with evidence supporting the section 667.71 allegation. Defendant did nothing to counter the prosecution's evidence or challenge the section's application based on the pleadings. (*People v. Toomey* (1985) 157 Cal.App.3d 1, 11.) The time to raise this issue was at the trial level. If it had been raised at that time, the pleadings could have been corrected, if necessary, by amendment.

Defendant's reference to *People v. Mancebo* (2002) 27 Cal.4th 735 is misplaced. In *Mancebo*, the defendant was charged with and convicted of One Strike crimes involving two victims. The information cited section 667.61 and alleged that the crimes against one victim were committed under the circumstances of kidnapping and firearm use, while the crimes against the other victim were committed under the circumstances of firearm use and binding. The information did not allege as a qualifying circumstance that the crimes were committed against multiple victims. (§ 667.61, subd. (e)(5).) As to each of the crimes, the information also alleged firearm use within the meaning of section 12022.5. (*Mancebo*, at p. 740.)

The trial court sentenced the defendant to two terms under the One Strike law, but in order to apply two additional 10-year gun use enhancements under section 12022.5, subdivision (a), the trial court substituted section 667.61, subdivision (e)(5), the multiple victim circumstance, for the One Strike law provisions that had been pled and proved. (*People v. Mancebo*, *supra*, 27 Cal.4th 735, 740.) On appeal, our Supreme Court, affirming the appellate court, found the trial court's imposition of the gun use enhancements under section 12022.5, subdivision (a), unauthorized. The One Strike law provides that, when the minimum number of qualifying circumstances have been pled and proved (gun use and kidnapping for one victim and gun use and binding for the other), they must be used as the basis for imposing the One Strike term and not to impose any lesser enhancement. (§ 667.61, subd. (f).) The trial court's substitution of the unpled multiple victims circumstance as a basis for imposing the One Strike sentences violated the express language of section 667.61, subdivision (f), and defendant's due process right to fair notice of the statutory bases of sentence enhancements brought against him. (*Mancebo*, at pp. 743-754.)

This case is distinguishable from *Mancebo*. First, this case involves section 667.71, not 667.61. Second, and more importantly, there was no surprise application of section 667.71 at sentencing. The record is void of any support for any claim that defendant was misled by the allegation in the information.

3. Section 667.71 as an alternative sentencing scheme.

Defendant was sentenced to an eight-year determinate term for his offense of kidnapping for the purpose of sexually molesting a child, a concurrent six-year term for

his offense of committing a lewd act upon a child under 14 years of age, a concurrent three-year term for the offense of child abduction, and a consecutive term of 25 years to life. On appeal, he contends that his sentence of 25 years to life must be vacated because section 667.71 is not an "enhancement" statute, but an alternative sentencing scheme which increases punishment for commission and conviction of a current offense. (*People v. Murphy* (2001) 25 Cal.4th 136, 139, 149-151, 155-156.) We agree. Because it is unclear as to which offense the trial court imposed the 25 year-to-life sentence, we must remand.

4. Section 654.

Defendant contends, and respondent concedes, that sentence may only be imposed for one of the offenses of which defendant was charged because the child abduction (§ 278) and kidnapping to commit a lewd act (§ 207, subd. (b)) were committed as a means of accomplishing one objective, committing the lewd act (§ 288, subd. (a)). Thus, defendant's sentences on two of his three offenses should have been stayed. (§ 654.) Because we are remanding for resentencing, the trial court can correct this error on remand.

DISPOSITION

The judgment of conviction is affirmed. Defendant's sentence is vacated and the case is remanded for further proceedings consistent with the views expressed in this opinion.

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HOLLENHORST
Acting P. J.

I concur:

WARD
J.

GAUT, J.

I respectfully dissent:

I do not believe there is sufficient evidence to establish the corpus delicti of the crimes of which Charles Weller is charged. Although recent authority holds that section 18, subdivision (d), the Right to Truth-in-Evidence, added to article I of the California Constitution, did "abrogate [the] corpus delicti basis for excluding the defendant's extrajudicial statements from evidence," it did not "abrogate the corpus delicti rule insofar as it provides that every *conviction* must be supported by some proof of the corpus delicti *aside from* or *in addition to* such statements . . . ." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1165, original italics.)

In this case there was no proof of the corpus delicti aside from any statements made by Charles Weller. My colleagues rely upon a case from this court, *People v. Culton* (1992) 11 Cal.App.4th 363, to support its conclusion that there was sufficient evidence of the corpus delicti to convict Weller. *Culton* cannot be relied upon to reach that conclusion.

The *Culton* case involved a defendant charged with section 288, subdivision (a), committing a lewd and lascivious act upon a child under 14. Defendant in that case contended that the trial court erred in admitting evidence of his extrajudicial statement because there was insufficient evidence of the corpus delicti. The trial court found that there was sufficient evidence of the corpus delicti of the charged offenses, based upon the testimony of an expert witness, a board certified pediatrician.

The doctor testified that he had conducted a forensic genital exam of the minor girl and found adhesions of the vagina that could have been caused by a third person rubbing the minor's labia with a finger or hand, or by the minor rubbing the labia, or by a trauma to the genital area caused by someone manipulating the genitalia, or by a skin condition or yeast infection. He also examined the child's hymen and found that it was in the upper limit of the normal size range for a five-year-old female. The doctor concluded that the vagina adhesions and size of the hymen of the minor were consistent with the minor being a victim of sexual abuse. This court concluded that "cumulatively such testimony was sufficient evidence to raise reasonable inferences of the corpus delicti of the offenses as charged against defendant." (*People v. Culton*, *supra,* 11 Cal.App.4th at p. 372.)

Contrast that evidence with the amorphous facts relied upon by the majority in this case. A neighbor observed the defendant pick up the child, hug him, and then take him for a 20-minute car ride. Another neighbor observed defendant driving up and down the street while looking at some of the children in their yards. Neither of those witnesses observed any inappropriate conduct with any child. There was no evidence by any competent professional that the child, Daniel, was even molested. Instead, the majority relies upon the fact that Daniel, two and one-half years old, was going to the bathroom outside and was showing his "private parts" to the boy next door. There was no testimony, or even an educated suggestion that either of those activities were evidence of molestation. In addition, the trial court allowed testimony from the boy who was molested by Weller 30 years ago and as a result of which he was required to be registered as a sex offender. Hardly evidence relevant to the issues in this case.

I suggest that none of the evidence upon which the majority relies created a reasonable inference of the corpus delicti of the offenses charged against Weller. I would reverse the convictions.

s/Gaut
J.